Bongsor Bina Sdn Bhd v SH Builders & Marketing Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(C)(A)-2315–12 OF 2022
HANIPAH FARIKULLAH, CHE MOHD RUZIMA AND AZIZUL AZMI ADNAN JJCA
10 MAY 2024

Arbitration — Agreement — Jurisdiction of court — Respondent filed court action against appellant — Court action stayed by sessions court pending arbitration — Whether under the law, arbitration clause prohibited contracting parties from instituting court action — Whether court action valid even though it was subjected to stay application under s 10 of Arbitration Act 2005 to refer the dispute to arbitration — Arbitration Act 2005 ss 8 & 10 — Subordinate Courts Act 1948 s 65(1)(b)

Limitation — Period of limitation — Computation of limitation period — Respondent filed court action against appellant — Court action stayed by sessions court pending arbitration — Preliminary issue on statutory limitation arose — Application for determination of questions of law under s 41 of Arbitration Act 2005 — Whether, when an action filed in court was stayed under s 10 of the Arbitration Act 2005 for the disputes to be referred to arbitration, computation of limitation period stopped at time when action was filed in court or ceased when notice of arbitration was served thereafter — Arbitration Act 2005 ss 23 & 41 — Limitation Act 1953 ss 2, 6(1), (2), 30

Statutory Interpretation — Construction of statutes — Liberal approach — Interpretation of limitation law — In dubiis, benigniora praeferenda sunt — Ut res magis valeat quam pereat — Whether liberal or reasonable approach should prevail over strict approach — Arbitration Act 2005 s 23 — Limitation Act 1953 ss 2, 6(2) & 30

Bongsor Bina Sdn Bhd ('the appellant') was appointed by LB Development Sdn Bhd as the main contractor for a construction project and the appellant in turn appointed SH Builders & Marketing Sdn Bhd ('the respondent') as the sub-contractor for the said project pursuant to a letter of award dated 26 June 2012 ('the LOA'). It ought to be noted that there was an arbitration clause in the LOA. A problem arose between the parties in relation to the final progress claim amounting to RM430,030.78 which the appellant failed to pay to the respondent and consequently, the respondent terminated the contract between the parties under the LOA. The respondent then filed an action in the sessions

court ('Suit 350') against the appellant but upon the application by the appellant, the action was stayed by the sessions court pending arbitration. Before the arbitral tribunal, a preliminary issue on statutory limitation was raised. In this regard, it was an undisputed fact that the cause of action was still within the limitation period when Suit 350 was filed in court, but limitation had set in when the notice of arbitration was served after the court action had been stayed. With the consent of the arbitrator, the respondent filed an application to the High Court pursuant to s 41 of the Arbitration Act 2005 ('the AA 2005') for the determination of the questions of law regarding the issue of statutory limitation. The learned High Court judge ('the LHCJ') ruled that based on sub-s 6(2) of the Limitation Act 1953 ('the LA 1953'), the limitation period stopped when the court action began, even if the dispute was later referred to arbitration as a result of a successful stay application. The LHCJ also considered the provisions in s 30 of the LA 1953 and s 23 of the AA 2005 but held that such provisions were only applicable to cases where the dispute was directly referred to arbitration *ab initio* in the absence of a prior court action that had been stayed. Based on the fact of the case, the cause of action of the dispute accrued either on 25 September 2013 or 18 March 2014. Therefore, since Suit 350 was commenced by writ on 6 August 2019, it was well within the limitation period of six years prescribed by sub-s 6(1) of the LA 1953. Aggrieved by the LHCJ's decision, the appellant filed the present appeal. The sole issue to be determined in the present appeal was whether, when an action filed in court was stayed under s 10 of the AA 2005 for the disputes to be referred to arbitration, the computation of limitation period stopped at the time when the action was filed in court or ceased when the notice of arbitration was served thereafter.

Held, affirming the LHCJ's decision and dismissing the appeal with costs of RM20,000 to the respondent subject to allocator:

(1) In principle, the statute of limitation did not extinguish debts but merely barred the right to recover the debts after the specified time had lapsed from the accrual of the cause of action. The primary objective of limitation law was to discourage plaintiffs from sleeping on their right to act and more importantly, to have a definite end to a stale claim. In other words, the plaintiffs would be penalised for sitting on their right to act within time set under the LA 1953 even though the debts were still due. Based on a such serious consequences, the court observed that the courts would usually prefer to adopt liberal approach in interpretating the law to avoid such penalties in any particular case. Therefore, in the present appeal, the liberal or reasonable approach should prevail over the strict approach, since it involved an act of taking away the respondent's right to act against the appellant. Thus, the legal maxim in *dubiis, benigniora praeferenda sunt* which meant in doubtful cases, the more favourable

views were to be preferred, and the more liberal interpretation should apply (see paras 29, 31 & 44). A

(2) The court had also referred to the legal maxim, *ut res magis valeat quam pereat*, which meant words were to be understood in such that the subject matter may be more effective than wasted or it was better for a thing to have effect than to be made void. Applying this maxim to the respondent's situation, the court found that it was important to clarify the subject matter rather than confuse. More importantly, the court had to adopt the legal maxim in order to avoid any absurd results (see paras 32, 35 & 44). B C

(3) Under the law, the arbitration clause did not prohibit the contracting parties from instituting proceedings in courts. In effect, none of the provision under the AA 2005 or LA 1953 would effectively limit or oust the jurisdiction of the courts. Even though s 8 of the AA 2005 provided that 'No court shall intervene in matters governed by this Act, except where so provided in this Act', the court was of the view that the court's jurisdiction was limited only to matter that had already been referred to arbitration. Perspicuously, this did not mean to bar the contracting parties from filing civil action in courts even if the claims were based on an arbitration agreement. The courts always maintained the unfettered jurisdiction to hear any civil action, and for the lower courts it would subject to the jurisdictional limit set under the Subordinate Courts Act 1948 ('the SCA 1948') (see paras 36 & 39). D E

(4) In relation to the sessions court's civil jurisdiction, para 65(1)(b) of the SCA 1948 provided that a sessions court shall have jurisdiction to try all other actions and suits of a civil nature where the amount in dispute or the value of the subject matter did not exceed one million ringgit. As the basic principle of law stated that a court's jurisdiction could not be ousted by consensus of parties, the court was of the view that the jurisprudential philosophy on the jurisdiction of the courts to deal with all civil matters, including the matters that involved an arbitration agreement, as propounded by the Supreme Court in the case of *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 and by the Federal Court in the case of *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273 remained as a good law even after the enactment of the AA 2005. Thus, Suit 350 was a valid action even though it was subjected to the stay application under s 10 of the AA 2005 to refer the dispute to arbitration (see para 40). F G H

(5) The notice of arbitration issued by the respondent was a consequence of the stay order issued by the learned sessions court judge on the appellant's application. It was a continuation process which flowed from the respondent's action in Suit 350. Therefore, the process of issuing the notice of arbitration arising out of a stay order could not be viewed in I

isolation. Moreover, s 2 of the LA 1953 defined an 'action' to include a suit or any other proceeding in a court of law. Plainly, the respondent could not be said to have sat on his right, nor could he be blamed for not taking action on a stale claim upon filling the notice of arbitration after Suit 350 had been stayed. Coupled with the jurisprudential philosophy on the jurisdiction of the courts to deal with all civil matters, the court was of the view that the LHCJ was correct in his finding that the provision in s 30 of the LA 1953 and s 23 of the AA 2005 only applicable to cases where the dispute directly referred to arbitration (see paras 41–42).

(6) Based on the above findings, the court agreed with the respondent's argument that it would be unreasonable, unjust, unfair and indeed tactical for the appellant to subsequently raise the defence of limitation against the respondent in the arbitration proceedings when the respondent was complying with the stay order in satisfying the request of the appellant to resolve the matter in dispute in arbitration. The court also found that the stay order would be rendered nugatory or redundant if the court decided in favour of the appellant's argument, that was, the limitation had set in against the respondent upon service of the notice of arbitration on 1 July 2020. Therefore, the court agreed with the findings of the LHCJ that: (a) the limitation stopped based on sub-s 6(2) of the LA 1953 in respect of the dispute when the respondent commenced an action via Suit 350 against the appellant on 6 August 2019; and (b) s 30 of the LA 1953 and s 23 of the AA 2005 only applicable to cases where the dispute was directly referred to arbitration *ab initio* in the absence of a prior court action that had been stayed (see paras 45–46).

[Bahasa Malaysia summary

Bongsor Bina Sdn Bhd ('perayu') telah dilantik oleh LB Development Sdn Bhd sebagai kontraktor utama bagi satu projek pembinaan dan perayu pula kemudiannya melantik SH Builders & Marketing Sdn Bhd ('responden') sebagai sub-kontraktor bagi projek tersebut menurut surat tawaran bertarikh 26 Jun 2012 ('LOA tersebut'). Perlu diingat bahawa terdapat klausa timbang tara dalam LOA tersebut. Masalah timbul antara pihak-pihak berhubung dengan tuntutan kemajuan akhir berjumlah RM430,030.78 yang gagal dibayar oleh perayu kepada responden dan akibatnya, responden telah menamatkan kontrak antara pihak-pihak di bawah LOA tersebut. Responden kemudiannya memfailkan tindakan di mahkamah sesyen ('Saman 350') terhadap perayu tetapi atas permohonan perayu, tindakan tersebut telah digantung oleh mahkamah sesyen sementara menunggu rujukan kepada timbang tara. Di hadapan tribunal timbang tara, isu awalan mengenai had masa berkanun telah dibangkitkan. Dalam hal ini, adalah fakta yang tidak dipertikaikan bahawa kausa tindakan masih dalam tempoh had masa apabila Saman 350 difailkan di mahkamah, tetapi had masa telah ditetapkan apabila

notis timbang tara disampaikan selepas penggantungan tindakan mahkamah. Dengan persetujuan penimbang tara, responden memfailkan permohonan kepada Mahkamah Tinggi menurut s 41 Akta Timbang Tara 2005 ('AT 2005') untuk penentuan persoalan undang-undang berhubung isu had masa berkanun. Hakim Mahkamah Tinggi yang bijaksana ('HMT') memutuskan bahawa berdasarkan sub-s 6(2) Akta Had Masa 1953 ('AHM 1953'), tempoh had masa berhenti apabila tindakan mahkamah bermula, walaupun pertikaian tersebut kemudiannya dirujuk kepada timbang tara hasil daripada permohonan penggantungan yang berjaya. Hakim Mahkamah Tinggi juga mempertimbangkan peruntukan-peruntukan dalam s 30 AHM 1953 dan s 23 AT 2005 tetapi berpendapat bahawa peruntukan-peruntukan tersebut hanya terpakai untuk kes di mana sesuatu pertikaian dirujuk secara langsung kepada timbang tara *ab initio* tanpa tindakan mahkamah terdahulu yang telah digantung. Berdasarkan fakta kes, kausa tindakan bagi pertikaian pihak-pihak terakru sama ada pada 25 September 2013 atau 18 Mac 2014. Oleh itu, memandangkan Saman 350 dimulakan melalui writ pada 6 Ogos 2019, ia berada dalam tempoh had masa enam tahun yang ditetapkan oleh sub-s 6(1) AHM 1953. Terkilan dengan keputusan HMT, perayu memfailkan rayuan semasa. Satu-satunya isu yang perlu ditentukan dalam rayuan ini ialah sama ada, apabila tindakan yang difailkan di mahkamah telah digantung di bawah s 10 AT 2005 untuk rujukan pertikaian tersebut kepada timbang tara, pengiraan tempoh had masa berhenti pada masa tindakan tersebut difailkan di mahkamah atau berhenti apabila notis timbang tara disampaikan selepas itu.

Diputuskan, mengesahkan keputusan HMT dan menolak rayuan dengan kos sebanyak RM20,000 kepada responden tertakluk kepada alokator:

(1) Pada dasarnya, statut had masa tidak menghapuskan hutang tetapi hanya menghalang hak untuk mendapatkan semula hutang selepas masa yang ditetapkan telah luput daripada akruan kausa tindakan. Objektif utama undang-undang had masa adalah untuk menghalang plaintif-plaintif daripada mengabaikan hak mereka untuk bertindak dan yang lebih penting, untuk menamatkan tuntutan lapuk secara muktamad. Dalam erti kata lain, plaintif-plaintif akan dihukum kerana mengabaikan hak mereka untuk bertindak dalam masa yang ditetapkan di bawah AHM 1953 walaupun hutang masih perlu dibayar. Berdasarkan akibat yang begitu serius, mahkamah mendapati bahawa mahkamah-mahkamah biasanya lebih suka menggunakan pendekatan liberal dalam mentafsir undang-undang tersebut untuk mengelakkan hukuman sedemikian dalam mana-mana kes tertentu. Oleh itu, dalam rayuan ini, pendekatan liberal atau munasabah harus mengatasi pendekatan yang ketat, kerana ia melibatkan tindakan mengambil hak responden untuk bertindak terhadap perayu. Oleh itu, pepatah undang-undang in *dubiis, benigniora praeferenda sunt* yang bermaksud dalam kes-kes yang meragukan, pandangan yang lebih menguntungkan harus diutamakan, dan tafsiran

yang lebih liberal harus digunakan (lihat perenggan 29, 31 & 44).

(2) Mahkamah juga telah merujuk kepada pepatah undang-undang, *ut res magis valeat quam pereat*, yang bermaksud perkataan-perkataan harus difahami dalam keadaan di mana perkara dalam pertikaian boleh diberikan kesan daripada sia-sia atau lebih baik sesuatu perkara itu mempunyai kesan daripada menjadi batal. Mengguna pakai pepatah ini kepada situasi responden, mahkamah mendapati bahawa adalah penting untuk menjelaskan perkara dalam pertikaian daripada mengelirukannya. Lebih penting lagi, mahkamah perlu menerima pakai pepatah undang-undang tersebut untuk mengelakkan apa-apa keputusan yang tidak masuk akal (lihat perenggan 32, 35 & 44).

(3) Di bawah undang-undang, klausa timbang tara tidak melarang pihak-pihak yang memasuki kontrak daripada memulakan prosiding di mahkamah. Sebenarnya, tiada satu pun peruntukan di bawah AT 2005 atau AHM 1953 yang pada kesannya akan mengehadkan atau menghapuskan bidang kuasa mahkamah. Walaupun s 8 AT 2005 memperuntukkan bahawa 'Melainkan jika diperuntukkan selainnya, tiada mahkamah boleh campur tangan dalam apa-apa perkara yang dikawal oleh Akta ini', mahkamah berpandangan bahawa bidang kuasa mahkamah hanya dihadkan bagi perkara yang telah pun dirujuk kepada timbang tara. Jelas sekali, ini tidak bermaksud bahawa pihak-pihak yang berkontrak dihalang daripada memfailkan tindakan sivil di mahkamah walaupun tuntutan tersebut adalah berdasarkan perjanjian timbang tara. Mahkamah sentiasa mengekalkan bidang kuasa yang tidak terikat untuk mendengar apa-apa tindakan sivil, dan bagi mahkamah rendah ia tertakluk kepada had bidang kuasa yang ditetapkan di bawah Akta Mahkamah Rendah 1948 ('AMR 1948') (lihat perenggan 36 & 39).

(4) Berhubung dengan bidang kuasa sivil mahkamah sesyen, perenggan 65(1)(b) AMR 1948 memperuntukkan bahawa mahkamah sesyen hendaklah mempunyai bidang kuasa untuk membicarakan semua tindakan dan guaman lain yang bersifat sivil di mana jumlah yang dipertikaikan atau nilai daripada perkara tersebut tidak melebihi satu juta ringgit. Oleh kerana prinsip asas undang-undang menyatakan bahawa bidang kuasa mahkamah tidak boleh disingkirkan melalui konsensus pihak-pihak, mahkamah berpendapat bahawa falsafah perundangan mengenai bidang kuasa mahkamah untuk menangani semua perkara sivil, termasuk perkara yang melibatkan perjanjian timbang tara, seperti yang dicadangkan oleh Mahkamah Agung dalam kes *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 dan oleh Mahkamah Persekutuan dalam kes *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273 kekal sebagai undang-undang yang sah walaupun selepas penggubalan AT 2005. Oleh itu, Saman 350 adalah tindakan yang sah walaupun ia tertakluk kepada permohonan

penggantungan di bawah s 10 AT 2005 bagi merujuk pertikaian tersebut kepada timbang tara (lihat perenggan 40).

(5) Notis timbang tara yang dikeluarkan oleh responden adalah berpunca daripada perintah penggantungan yang dikeluarkan oleh hakim mahkamah sesyen yang bijaksana atas permohonan perayu. Ia adalah proses berkesinambungan yang berpunca daripada tindakan responden dalam Saman 350. Oleh itu, proses mengeluarkan notis timbang tara yang berpunca daripada perintah penggantungan tidak boleh dilihat secara berasingan. Selain itu, s 2 AHM 1953 mentakrifkan 'tindakan' termasuk guaman atau apa-apa prosiding lain di mahkamah. Secara jelas, responden tidak boleh dikatakan telah mengabaikan haknya, dan dia juga tidak boleh dipersalahkan kerana tidak mengambil tindakan terhadap tuntutan lapuk apabila dia memfailkan notis timbang tara selepas Saman 350 telah digantung. Ditambah dengan falsafah perundangan mengenai bidang kuasa mahkamah untuk menangani semua perkara sivil, mahkamah berpendapat bahawa HMT adalah betul dalam dapatannya bahawa peruntukan-peruntukan dalam s 30 AHM 1953 dan s 23 AT 2005 hanya terpakai kepada kes-kes di mana sesuatu pertikaian itu dirujuk terus kepada timbang tara (lihat perenggan 41–42).

(6) Berdasarkan dapatan-dapatan di atas, mahkamah bersetuju dengan hujah responden bahawa adalah tidak munasabah, tidak saksama, tidak adil dan sememangnya suatu taktikal untuk perayu kemudiannya membangkitkan pembelaan had masa terhadap responden dalam prosiding timbang tara apabila responden telah mematuhi perintah penggantungan dalam memenuhi permintaan perayu untuk menyelesaikan perkara yang dipertikaikan dalam timbang tara. Mahkamah juga mendapati bahawa perintah penggantungan tersebut akan menjadi sia-sia atau berlebihan jika mahkamah memutuskan memihak kepada hujah perayu, iaitu had masa telah ditetapkan terhadap responden apabila notis timbang tara disampaikan pada 1 Julai 2020. Oleh itu, mahkamah bersetuju dengan dapatan-dapatan HMT bahawa: (a) had masa berhenti berdasarkan sub-s 6(2) AHM 1953 berkenaan dengan pertikaian tersebut apabila responden memulakan tindakan melalui Saman 350 terhadap perayu pada 6 Ogos 2019; dan (b) s 30 AHM 1953 dan s 23 AT 2005 hanya terpakai untuk kes-kes di mana sesuatu pertikaian itu dirujuk terus kepada timbang tara *ab initio* tanpa tindakan mahkamah terdahulu yang telah digantung (lihat perenggan 45–46).]

Cases referred to

Affin Credit (Malaysia) Sdn Bhd v Yap Yuen Fui [1984] 1 MLJ 169; [1984] 1 MLRA 352, FC (refd)

Badshah v Urmila Badshah Godse AIR 2014 SC 869, SC (refd)

Credit Corporation (M) Bhd v Fong Tak Sin [1991] 1 MLJ 409, SC (refd)
D Saibaba v Bar Council of India & Anor AIR 2003 SC 2502, SC (refd)
HS Vankani v the State of Gujarat AIR 2010 SC 1714, SC (refd)
Jones v Bellgrove Properties LD [1949] 2 KB 700, CA (refd)
Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Berhad [1981] 1 MLJ 234, FC (refd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474, SC (refd)
Nihal Singh v Bhag Singh [1977] 1 MLJ 8 (refd)
RB Policies at Lloyd's v Butler [1950] 1 KB 76, KBD (refd)
Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee) [1998] 4 MLJ 651, CA (refd)
Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena) [1995] 3 MLJ 273; [1996] 1 CLJ 231, FC (refd)
Tuck & Sons v Priester (1887) 19 QBD 629, CA (refd)
Westfield Design & Construction Pty Ltd v LR & M Constructions Pty Ltd BC9904455 (1999) SASC 3194, SC (refd)
Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd [2014] 3 MLJ 1; [2014] 2 MLRA 507, FC (refd)

Legislation referred to

Advocates Act 1961 [IN] s 48AA
Arbitration Act 1952 (repealed by Arbitration Act 2005) s 6
Arbitration Act 2005 ss 4(2), 8, 10, 10(1), (3), 23, 30, 41
Limitation Act 1953 ss 2, 6, 6(2), 30
Movement Control Order under Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020
Rules of Court 2012 O 18 r 19
Subordinate Courts Act 1948 s 65(1)(b)

Appeal from: WA-24C(ARB)-8–03 of 2022 (High Court, Kuala Lumpur)

Paul Lee Teong Ghee (T G Lee & Assoc) for the appellant.
Liow Si Khoon (with Jennifer Lai Sui Ting and Jonathan Lee Xing Sheng) (Liow & Co) for the respondent.

Che Mohd Ruzima JCA:

INTRODUCTION

[1] The sole issue to be determined in this appeal is whether, when an action filed in court is stayed under s 10 of the Arbitration Act 2005 ('the AA 2005') for the disputes to be referred to arbitration, the computation of limitation period stop at the time when the action is filed in court or ceases when the notice of arbitration is served thereafter?

[2] The issue arose from an action filed by SH Builders & Marketing Sdn Bhd (plaintiff/respondent) against Bongsor Bina Sdn Bhd (defendant/appellant) at Kuala Lumpur Sessions Court via Suit No WA-B52(NCvC)-350–08 of 2019 ('the KLSC Suit 350'). It is an undisputed fact that the cause action was still within the limitation period when the KLSC Suit 350 was filed in court, but limitation had set in when the notice of arbitration was served after the court action has been stayed.

[3] For ease of reference, parties will be referred to as they were in the High Court, the plaintiff and the defendant.

FACTS OF THE CASE

[4] The relevant background facts of this case have been set out in the grounds of decision ('the GOD') of the learned High Court judge ('the LHCJ') dated 2 December 2022, from which the current appeal arises. For the purpose of this appeal, a brief summary, largely derived from the GOD, is provided below.

[5] The defendant is the main contractor appointed by LB Development Sdn Bhd to construct and complete the project described as 'Cadangan Membina 12 Unit Banglo 1 Tingkat Yang Mengandungi Type A-6 Unit dan Type B-6 Unit Berserta 1 Unit Substation di Atas Lot 2512, Seksyen 36, Poskod 40470 Shah Alam' ('the said project').

[6] By a letter of award dated 26 June 2012 ('LOA') which included an arbitration agreement, the defendant appointed the plaintiff as its sub-contractor for the said project. The commencement date and completion date for the said project, as per the LOA, were set as 26 June 2012 and 25 June 2013, respectively.

[7] The construction and completion of the said project by the plaintiff pursuant to the LOA was delayed and the plaintiff sought for an extension of time which the defendant did not respond to. As the result, the plaintiff on 26 August 2013 issued its Final Progress Claim (No 14) amounting to RM430,030.78 and thereafter on 22 October 2013 notified to the defendant of its intention to terminate the contract under the LOA.

[8] The defendant responded on 18 March 2014 and again on 5 March 2015 rejecting the plaintiff's unilateral termination of contract. Consequently, the plaintiff on 6 August 2019 instituted the KLSC Suit 350 to claim for the unpaid sum of RM430,030.78.

[9] In response, the defendant filed an application to stay the KLSC Suit 350 for the dispute between the parties be referred to arbitration. Albeit the plaintiff resisted the stay application, the learned sessions court judge ('LSCJ') on 31 October 2019 allowed the stay application of the defendant. The plaintiff did not appeal against the stay order and accordingly on 1 July 2020 served its notice of arbitration on the defendant to commence the arbitration proceeding.

[10] In a letter dated 30 July 2020 from its solicitors, the defendant replied, stating their agreement to refer the matter to arbitration. However, the defendant stressed that limitation has set in pursuant to s 30 of the Limitation Act 1953 ('the LA 1953') read together with s 6 of the same Act. The parties thereafter commenced the arbitration proceeding.

[11] The matter was referred to Asian International Arbitration Centre and Sivabalan a/l NP Subramaniam was appointed as the arbitrator. Before the arbitrator, a preliminary issue on statutory limitation was raised. With the consent of the arbitrator, on 15 March 2022 the plaintiff made an application to the High Court pursuant to s 41 of the AA 2005 to determine the following questions of law:

(a) in the context of s 6 of the Limitation Act 1953, whether time already stops when the plaintiff/applicant filed the writ summons and statement of claim vis a vis Kuala Lumpur Sessions Court Suit No WA-B52(NCVC)-350–08 of 2019 on 6 August 2019, which was subsequently stayed pending arbitration pursuant to the order dated 31 October 2019 or time only stops when the plaintiff/applicant served the notice of arbitration on the defendant/respondent on 1 July 2020;

In the alternative; and

(b) whether the plaintiff's/applicant's claim against the defendant/respondent was time-barred by s 6 of the Limitation Act 1953 when the plaintiff/applicant served the notice of arbitration on the defendant/respondent following the order by the Kuala Lumpur Sessions Court Suit No WA-B52(NCVC)-350–08 of 2019 dated 31 October 2019 pending arbitration, even though the writ summons and statement of claim was filed much earlier on 6 August 2019.

THE LHCJ'S DECISION

[12] Notwithstanding that the plaintiff's application to the High Court pursuant to s 41 of the AA 2005 has been consented to by the defendant as well as the arbitrator, the LHCJ did inquire whether the questions posed indeed questions of law in accordance with the requirements of sub-s 4(2) of the AA 2005. Upon carefully reviewed the questions, the LHCJ was satisfied that the

determination of the questions would substantially affect the rights of one or more of the parties and was likely to produce substantial savings in cost.

[13] As to the questions posed, the LHCJ held that any court action commenced in breach of an arbitration agreement is valid, subject to the party applying for a stay of the court action to have the dispute referred to arbitration instead. Thus, the limitation period stops based on sub-s 6(2) of the LA 1953 when the court action begins, even if the dispute is later referred to arbitration as a result of a successful stay application. The LHCJ also considered the provisions in s 30 of the LA 1953 and s 23 of the AA 2005 but held them to be applicable only to cases where the dispute is directly referred to arbitration *ab initio* in the absence of a prior court action that has been stayed. Based on the fact of the case, the cause of action of the dispute accrued either on 25 September 2013 or 18 March 2014. Therefore, since the KLSC Suit 350 was commenced by writ on 6 August 2019, it is well within the limitation period of six years prescribed by sub-s 6(1) of the LA 1953.

[14] The LHCJ's answer to the main question is in the affirmative, and consequently, the answer to the alternative question is in the negative. The LHCJ ordered that the costs of the application shall be costs in the cause of the arbitration.

THE APPEAL

[15] The synopsis of defendant's grounds for appeal as mounted in the memorandum of appeal dated 1 February 2023 are as follows:

(a) the LHCJ erred in law when he failed to consider that time only stopped upon issuing of the notice to arbitrate on 30 June 2020 wherein limitation has set in, and not when a writ action is taken on 6 August 2019;

(b) the LHCJ failed to recognise that the arbitration proceeding and the court proceeding are both different proceeding with different corum and with specific and differences law applicable;

(c) the LHCJ erred in taking the stand that s 30 of the LA 1953 and s 23 of the AA 2005 will only be applicable for cases that refers directly to arbitration and does not apply when a case initiated in the court action;

(d) the LHCJ erred in relying to the case of *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273; [1996] 1 CLJ 231 as the case is decided before there was an amendment that limit the use of common law and the court inherent jurisdiction. Therefore, the court jurisdiction should now be based on s 23 of the AA 2005 that times stop when an arbitration notice has been issued; and

(e) the LHCJ erred in failing to consider that sub-s 10(3) of the AA 2005 allows the plaintiff to issue the notice of arbitration to stop the limitation pending the ongoing stay application.

SUMMARY OF THE DEFENDANT'S SUBMISSION

[16] Learned council for the defendant (LCD) referred to a book, Sundra Rajoo in *Law, Practice and Procedure of Arbitration* (2nd Ed) at p 240 which states that 'time generally starts to run against a claim from the date on which the cause of action arises, therefore the claimant has to commence his arbitration within the same periods laid down by the Limitation Act 1953, failing which the right to go to arbitration or indeed the claim itself is apt to be barred.' He also referred to sub-s 10(3) of the AA 2005 and argued that the time stopped running only when the plaintiff filed the notice of arbitration which is on 1 July 2020, at which point the six years limitation period had set in and the plaintiff action in the arbitration is time-barred.

[17] The LCD further referred to Federal Court decisions in *Winstech Engineering Sdn Bhd v Espl (M) Sdn Bhd* [2014] 3 MLJ 1; [2014] 2 MLRA 507 at para 18 where it states that 'When a specific law has been enacted pertaining to any power or right relating to legal proceedings, that specific law shall prevail over any other similar laws' and in *Affin Credit (Malaysia) Sdn Bhd v Yap Yuen Fui* [1984] 1 MLJ 169; [1984] 1 MLRA 352 at p 355 para 6 which held that the court have no powers to legislate where there is a gap in the provisions of the statute and the duty of the court is limited to interpreting the words used by the legislature. It was argued that to interpret that time stop for arbitration proceeding when an action is file in the court is clearly against the provision of s 23 of the AA 2005, and s 8 of the AA 2005 curbed the court's inherent jurisdiction and active interpretation or judicial activism.

[18] Finally, the LCD submitted that the LHCJ has wrongly referred to the Federal Court case of *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273; [1996] 1 CLJ 231 ('*Tan Kok Cheng*'s case') as the commons law principle has been incorporated in sub-s 10(3) of the AA 2005 where the plaintiff can institute the court action concurrently with the arbitration. Furthermore, *Tan Kok Cheng*'s case was decided before the AA 2005 where the stay was made under s 6 of the Arbitration Act 1952.

SUMMARY OF THE PLAINTIFF'S SUBMISSION

[19] Learned council for the plaintiff ('LCP') argued that the LHCJ's decision that limitation stops when the Court action *via* KLSC Suit 350 is commenced even though the dispute is subsequently referred to arbitration due to a successful stay application is correct and supported by the South

Australian Supreme Court's finding in *Westfield Design & Construction Pty Ltd v LR & M Constructions Pty Ltd BC9904455* (1999) SASC 3194. Thus, the arbitration proceeding is a subset of court proceeding, rendering notice of arbitration akin to writ summons.

[20] It was also argued that the arbitration is not to replace the court action but remains as an alternative dispute resolution. The arbitration regime as an alternative dispute resolution in nature is developed to complement and facilitate the court's ethos and should not be viewed as a bifurcating regime's perspective. That is why the court is directly empowered by the Parliament to stay a suit, instead of dismissing or striking out an existing suit *in toto* pursuant to s 10 of the AA 2005, and in many instances, the court would maintain a supervisory role over the arbitral process such as, for question of laws to be determined and for the registration of the final award. The inter-connect dynamics is to be acknowledged. Thus, the LHCJ's finding that s 30 of the LA 1953 and s 23 of the AA 2005 apply to dispute directly referred to arbitration *ab initio* only is correct because their clear wordings referred to arbitration proceedings exclusively.

[21] LCP further argued that s 23 of the AA 2005 was codified merely to provide a mirroring functional role of the notice of arbitration, like a writ in the context of limitation. Since the LHCJ found that limitation had already stopped on 6 August 2019 when the KLSC Suit 350 was filed, the HC had aptly found the Notice of Arbitration served on 1 July 2022 to be irrelevant and/or redundant in the computation of limitation of action. Moreover, if filing of the KLSC Suit 350 does not stop limitation, the stay order granted on 31 October 2019 which was after limitation set in on 26 September 2019, would be rendered nugatory or redundant. The LHCJ had aptly relied on the Federal Court case of *Tan Kok Cheng*'s case to state that the court proceeding filed by the plaintiff is valid because the court's jurisdiction cannot be ousted by consensus of parties to arbitrate, such principle remains valid after the AA 2005.

[22] On s 8 of the AA 2005, which provides that 'No court shall intervene in matters governed by this Act', it was contended that the said provision is not applicable to the present case because the present case does not have the conditions for its application. LCP submitted that none of such limitations on the jurisdiction of the courts as prescribed by the AA 2005 oust the judicial power of the courts to deal and hear any civil matters arising within their jurisdictions before the stay under sub-s 10(1) of the AA 2005 is activated and a matter which is the subject of an arbitration agreement if stayed, will be pending before the court.

[23] Finally, on sub-s 10(3) of the AA 2005, it was argued that the said

provision is also not applicable to the present case as it is enacted to allow continuum of arbitral proceedings and also for award to be made in arbitral proceeding while the same dispute is pending before court.

OUR DECISION

[24] The law on limitation of action is well settled. Limitation of actions under statutes, which impose periods of limitation for classes of actions, operates as an absolute defence to an action when pleaded and assumes the existence of a cause of action but does not create one. In *Sakapp Commodities (M) Sdn Bhd v Cecil Abraham (executor of the estate of Loo Cheng Ghee)* [1998] 4 MLJ 651, this court made the following observation:

> In our judgment, the present appeal falls to be decided in accordance with settled principles. It is beyond argument that the limitation of actions under statute is part of procedural and not substantive law. As Ong CJ said in *Othman & Anor v Mek* [1972] 2 MLJ 158 at p 160:
>
> > Statutes of limitation which bar the enforcement of a right by action are rules of procedure only: see 24 *Halsbury's Laws of England* (3rd Ed), p 181 A right which becomes unenforceable merely by reason of limitation does not ipso facto perish or vanish into thin air: see *Holmes v Crowther* [1970] 1 WLR 835 where it was held that although under s 18(5) of the Limitation Act 1939, arrears of mortgage interest outstanding for more than six years are irrecoverable by action, the mortgagors nevertheless were only entitled to the equitable remedy of redemption provided that they paid all arrears of mortgage interest, whether statute-barred or not. (Emphasis added.)
>
> In the same case, Ong Hock Sim FJ said (at p 165):
>
> > Statutes of limitation (as in this case) which bar the remedy but not the right, are rules of procedure only: (see 24 *Halsbury's Laws of England* (3rd Ed) p 181).
>
> Further, it is well established that limitation is merely a defence to an action. It assumes the existence of a cause of action and does not create one. For, as pointed out by Sir Richard Couch, when delivering the advice of the Board of the Privy Council in *Hari Nath Chatterjee v Mothurmohun Goswami* (1894) ILR 21 Cal 8 at p 18: The intention of the law of limitation is not to give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right'. Further, the defence of limitation cannot be relied upon unless specifically pleaded (see s 4 of the Limitation Act 1953).

[25] As to the principle of limitation under statute, Lord Goddard CJ in *Jones v Bellgrove Properties LD* [1949] 2 KB 700 held as follows:

> That statute does not extinguish debts: it merely bars the right to recover them after the lapse of the specified time from the accrual of the cause of action. If a claim is made for payment of a debt many years after it has been incurred, there may be difficulty in proving that the debt ever was in fact incurred or that it has not already been paid and so forth. That is why the law bars the right of action after a certain

period has elapsed from the accrual of the cause of action, but then if there is an acknowledgment of the debt within the terms of ss 23 and 24 of the Act, the right shall be deemed to have accrued on and not before the date of that acknowledgment.

In *RB Policies at Lloyd's v Butler* [1950] 1 KB 76, Streatfeild J held as follows:

I agree with Mr Atkinson that it is a policy of the Limitation Acts that those who go to sleep upon their claims should not be assisted by the courts in recovering their property, but another, and, I think, equal policy behind these Acts, is that there shall be an end of litigation, and that protection shall be afforded against stale demands. In *A' Court v Cross* 3 Bing 329, at 332. Best CJ referred to the policy of the Limitation Act 1623, as follows: 'It has been supposed that the legislature only meant to protect persons who had paid their debts, but from length of time had lost or destroyed the proof of payment. From the title of the act to the last section, every word of it shews that it was not passed on this narrow ground. It is, as I have heard it often called by great judges, an act of peace. Long dormant claims have often more of cruelty than of justice in them'. I am not suggesting that the plaintiffs in the present case are guilty of heartless or cruel conduct but a claim, made seven or eight years after the motor car was stolen, against a perfectly innocent holder, who has given good consideration for it without knowledge that it was a stolen car does not seem just. I think that an equal policy of the Limitation Act, 1939, is to prevent injustice of this kind.

In our jurisdiction, the Federal Court in the case of *Land Executive Committee of Federal Territory v Syarikat Harper Gilfillan Berhad* [1981] 1 MLJ 234 at p 237, Raja Azlan Shah Ag LP (as his Royal Highness then was) stated that:

... Having regard to the special provision for limiting the time within which to enforce the right, the indications are that Parliament has by using plain and unambiguous language intended the right to be exclusive of any other mode of enforcing it. The time limit is the foundation of the right given in the section. It is in the highest degree improbable that the period of three months as a limitation would have been inserted if an indefinite period were intended to be given. The period of three months is obviously for the purpose of preventing stale claims. If the contrary is sustainable, then the respondents are allowed to seek to enforce their statutory right by a method other than that prescribed by the Code creating it.

In the Supreme Court case of *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409, Hashim Yeop A Sani CJ (Malaya) observed as follows:

The doctrine of limitation is said to be based on two broad considerations. Firstly, there is a presumption that a right not exercised for a long time is nonexistent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.

The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim interest *reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

In short, the doctrine of limitation law is promulgated primarily to prevent plaintiffs from sleeping on their right of actions. The limitation of action is justified since long dormant claims have more of cruelty than justice in them and the defendant might have lost the evidence to disprove a stale claim. The doctrine surely encourages person with good cause of action to pursue it with reasonable diligence.

[26] Back to the appeal before us, it is undisputed that the plaintiff initiated KLSC Suit 350 before the limitation had expired. However, when the LSCJ's allowed the stay application on 1 October 2019 and later when the plaintiff served its Notice of Arbitration dated 30 June 2020 on the defendant to commence the arbitration proceeding on 1 July 2020, the limitation had set in. As mentioned in the introduction above, the sole issue for determination in this appeal is whether, when an action filed in court is stayed under s 10 of the AA 2005 for the disputes to be referred to arbitration, does the computation of limitation period stop at the time when the action is filed in court?

[27] To begin with, the relevant statutory provision related to the limitation of action to bring arbitration proceeding is under s 30 of the LA 1953 which specifically provides as follows:

> 30 Application of Act and other limitation enactments to arbitrations
>
> (1) This Act and any other written law relating to the limitation of actions shall apply to arbitrations as they apply to actions.
>
> (2) Notwithstanding any term in any submission to the effect that no cause of action shall accrue in respect of any matter required by the submission to be referred until an award is made under the submission, the cause of action shall, for the purpose of this Act and of any other such written law (whether in their application to arbitrations or to other proceedings), be deemed to have accrued in respect of any such matter at the time when it would have accrued but for that term in the submission.
>
> (3) For the purpose of this Act and of any such written law as aforesaid, an arbitration shall be deemed to be commenced when one party to the arbitration serves on the other party a notice requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator, or, where the submission provides that the reference shall be to a person named or designated in the submission, requiring him or them to submit the dispute to the person so named or designated.
>
> (4) Any such notice as aforesaid may be served either-
>
> (a) by delivering it to the person on whom it is to be served;
>
> (b) by leaving it at the usual or last known place of abode in Malaysia of that person; or
>
> (c) by sending it by post in a registered letter addressed to that person at his usual or last known place of abode in Malaysia,

as well as in any other manner provided in the submission; and where a notice is sent by post in a manner prescribed by paragraph (c) of this subsection, service thereof shall unless the contrary is proved, be deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of post.

(5) Where the High Court orders that an award be set aside or orders, after the commencement of an arbitration, that the arbitration shall cease to have effect with respect to the dispute referred, the Court may further order that the period between the commencement of the arbitration and the date of the order of the Court shall be excluded in computing the time prescribed by this Act or any such written law as aforesaid for the commencement of proceedings (including arbitration) with respect to the dispute referred.

(6) This section shall apply to an arbitration under any written law as well as to an arbitration pursuant to a submission, and subsections (3) and (4) thereof shall have effect, in relation to an arbitration under any written law, as if for the references to the submission there were substituted references to such of the provisions of the law or of any order, scheme, rules, regulations, or by-laws made thereunder as relate to the arbitration.

(7) In this section the expressions 'arbitration', 'award' and 'submission' have the same meanings as in the Arbitration Act 1950 [Act 93].

Meanwhile, s 23 of the AA 2005 provides:

23 Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute shall commence on the date on which a request in writing for that dispute to be referred to arbitration is received by the respondent.

As to the limitation of action which is based on contract, sub-s 6(1) of the LA 1953 provides that no actions shall be brought after the expiration of six years from the date on which the cause of action accrued.

[28] Applying literally the aforementioned provision of the law to the plaintiff's action, it is not disputed that the limitation had set in when the plaintiff served its notice of arbitration on the defendant to commence the arbitration proceeding on 1 July 2020 since that the dispute accrued either on 25 September 2013 or 18 March 2014 based on the fact of the case. However, it is also not disputed that the plaintiff's KLSC Suit 350 was filed well within the time frame of six years. Based on the defendant's application under s 10 of the AA 2005, the LSCJ allowed the stay application and granted a stay order on 31 October 2019. Subsequent to that, the plaintiff had served the notice of arbitration dated 30 June 2020 on the defendant on 1 July 2020. In such a situation, when will the limitation period stop running?

[29] First and foremost, it is pertinent to note that in principle, the statute of limitation does not extinguish debts but merely bars the right to recover the debts after the specified time has lapsed from the accrual of the cause of action.

The primary objective of limitation law is to discourage plaintiffs from sleeping on their right to act and more importantly, to have a definite end to a stale claim. In other words, the plaintiffs will be penalised for sitting on their right to act within time set under the LA 1953 even though the debts are still due. Based on a such serious consequences, we observed that the courts will usually prefer to adopt liberal approach in interpretating the law to avoid such penalties in any particular case. In *Tuck & Sons v Priester* (1887) 19 QBD 629 at p 638, Lord Esher MR held as follows:

> ... We must be very careful in construing that section, because it imposes a penalty. If there is a reasonable interpretation which will avoid the penalty in any particular case we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal section ...

[30] In relation to the interpretation of the LA 1953, Hashim Yeop A Sani J in *Nihal Singh v Bhag Singh* [1977] 1 MLJ 8 at pp 11–12 made the following observation:

> There has been a divergence of authorities as to what should be the proper construction to be adopted to a Limitation Enactment, ie whether it should be the 'liberal construction (*Perry v Jackson* (1791) 4 TR 300, *Sturgis v Darell)* (1860) 6 H & N 120 or 'strict literal construction' *(Lloyds v Butler* (1950) 1 KB 76 CA, *Edmunds v Waugh* (1886) LR 1 Eq 418 421 — 'an Act taking away existing rights which must be construed with reasonable strictness.') But it appears that there is today no special method of construing Limitation Enactments — see *China v Harrow UDC* [1954] 1 QB 178185 — Goddard LCJ:
>
> > I can see no good reason for unduly limiting words which can apply to a particular case as the courts have always been against stale claims.

[31] Considering the aforementioned principles of interpretation of law on limitation to this present appeal, we are of the considered view that the liberal or reasonable approach should prevail over the strict approach, since it involves an act of taking away the plaintiff right to act against the defendant. Thus, the legal maxim *dubiis, benigniora praeferenda sunt* which means in doubtful cases, the more favourable views are to be preferred and the more liberal interpretation should apply.

[32] On the same point of law, we would also like refer to a legal maxim, *ut res magis valeat quam pereat,* which means words are to be understood in such that the subject matter may be more effective than wasted or it is better for a thing to have effect than to be made void. In *D Saibaba v Bar Council of India & Anor* AIR 2003 SC 2502, the question of interpretation of s 48AA of the Advocates Act 1961 came before the Supreme Court of India. The petitioner, who is a handicap advocate, was also running an STD booth allotted to him in the handicapped person's quota in which a complaint was filed against him

alleging of professional misconduct. The respondent directed him to surrender the booth but he failed to do so within the specified time period initiating the respondent to delete the petitioner's name from the roll of advocates. The petitioner subsequently surrendered the booth and filed a review petition against the order of the respondent. His petition was dismissed on 26 August 2001 on the ground that it was barred by limitation. The petitioner appealed to the Supreme Court. In construing s 48AA, it was held that the expression 'sixty days from the date of that order' must be read so as to mean the date of communication, knowledge, actual or constructive, of the order, sought to be reviewed. In applying the maxim *ut res magis valeat quam pereat,* the Supreme Court interpreted s 48AA to make it truly effective. As a result, the Supreme Court set aside the respondent's order and the enrolment of the petitioner was restored.

[33] In *HS Vankani v the State of Gujarat* AIR 2010 SC 1714, the Supreme Court of India observed that the maxim *ut res magis valeat quam pereat* also means that where the obvious intention of the Statute gives rise to obstacles in implementing it, then the court must find ways to overcome those obstacles in order to avoid absurd results. It is a well-settled principle of interpretation of Statutes that construction should not be put on a statutory provision that would lead to manifest absurdity, futility, palpable injustice, and absurd inconvenience or anomaly.

[34] Meanwhile, in *Badshah v Urmila Badshah Godse* AIR 2014 SC 869, the Supreme Court of India held that where there is a possibility of alternative constructions, the court should adopt such construction that will enable the smooth functioning of the system for which the statute has been enacted and the construction that becomes a roadblock in achieving the purpose of the statute should be discarded, and a construction that reduces the legislation to futility should be avoided.

[35] Applying the maxim *ut res magis valeat quam pereat* in relation to the plaintiff's situation in the appeal before us, we find that it is important to clarify the subject matter rather than confuse. More importantly, we have to adopt the legal maxim in order to avoid any absurd results. Based on those considerations in mind, we moved on to consider the issue raised in this appeal.

[36] In relation to the appeal before us, the fact that the plaintiff first initiated its claim against defendant by filing the KLSC Suit 350 despite the existence of an arbitration clause in the LOA, is significant. Under the law, the arbitration clause did not prohibit the contracting parties from instituting proceedings in courts. Supreme Court in *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 ('*Newacres Sdn Bhd*'s case') at p 481 made the following observation and proposition of law:

A The real question for our determination is whether in the face of the provision of cl 23 the respondent is entitled in law to go to court instead of referring the dispute to arbitration, considering that it does not contain the '*Seott v Avery clause*' *Dobb's case* (1935) 53 CLR 643 itself would provide an answer to this case, particularly the part of the judgment which reads:

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> What no contract can do is to take from a party to whom a right actually accrues, whether ex *contractu* or otherwise, his power of invoking the jurisdiction of the courts to enforce it. (*Kill v Hollister* (1746) 1 Wils 129); *Thompson v Charnock* (101 ER 1310); *Czarnikow v Roth, Schmidt & Co* [1922] 2 KB 478.) Accordingly, a contract providing for arbitration did not, apart from statute, prevent the institution of an action or suit, even although an actionable breach of contract was committed by the refusal to refer (*In re Smith & Service and Nelson & Sons* (1890) 25 QBD 545 at p 544, per Bowen LJ) But if, before the institution of an action, an award was made, it governed the rights of the parties and precluded them from asserting in the courts the claims which the award determined. By submitting the claims to arbitration, the parties confer upon the arbitrator an authority conclusively to determine them, That authority enables him to extinguish an original cause of action.

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This observation clearly supports the proposition that the respondent can still go to court, provided before the institution of an action, no award had been made by an arbitrator. In any case, cl 23 is never intended to oust the jurisdiction of the court under any circumstances, and we agree that in this case it is not the appellant'e case that the court's jurisdiction was thus ousted. *Chitty on Contracts* (26th Ed) Vol I on general principles can throw some light on this aspect of the appeal. In para 1072 under the heading 'Resort to court proceedings' it says:

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> If, contrary to an agreement to refer a matter to arbitration, one party resorts to proceedings in an English court in respect of that matter, the appropriate course is for the other party to apply for a stay of those proceedings. There is no principle that requires arbitration proceedings to terminate if a party to the arbitration resorts to court proceedings. Nor does resort to court proceedings by a party of itself constitute a repudiation of the arbitration agreement although it might do so if he thereby unequivocally demonstrates an intention to renounce or abandon the agreement.

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Later, in *Tan Kok Cheng & Sons Realty Co Sdn Bhd v Lim Ah Pat (t/a Juta Bena)* [1995] 3 MLJ 273 (*Tan Kok Cheng*'s case) at pp 278 and 279 the Federal Court held that:

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> At common law, a prior agreement between contracting parties to refer their disputes to arbitration did not operate to bar either of them from instituting proceedings in the ordinary courts. Neither did such a clause preclude the court from entertaining a suit filed in breach of the contract to arbitrate. However, the court could, in the exercise of its discretion, stay an action and require a plaintiff to adhere to the obligation voluntarily undertaken to go to arbitration. The judicial philosophy behind this approach is based upon sound principle. It is this. Since consent cannot confer jurisdiction upon a court which has none, there can be no consensual ousting of a court's jurisdiction to hear and determine disputes between litigants. See, *Inter Maritime Management Sdn Bhd v Kai Tai*

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Timber Co Ltd, Hong Kong [1995] 1 MLJ 322.

> At common law, a prior agreement between contracting parties to refer their disputes to arbitration did not operate to bar either of them from instituting proceedings in the ordinary courts. Neither did such a clause preclude the court from entertaining a suit filed in breach of the contract to arbitrate. However, the court could, in the exercise of its discretion, stay an action and require a plaintiff to adhere to the obligation voluntarily undertaken to go to arbitration. The judicial philosophy behind this approach is based upon sound principle. It is this. Since consent cannot confer jurisdiction upon a court which has none, there can be no consensual ousting of a court's jurisdiction to hear and determine disputes between litigants. See, *Inter Maritime Management Sdn Bhd v Kai Tai Timber Co Ltd, Hong Kong* [1995] 1 MLJ 322.

[37] On this point, LCD argued that the LHCJ had wrongly referred to the *Tan Kok Cheng*'s case as it is based on the commons law principle where the plaintiff can institute the court action concurrently with the arbitration. Furthermore, it was decided before the AA 2005 where the stay was made under s 6 of the AA 1952 instead of s 10 of the AA 2005 and that it did not state that time stop under the limitation period upon filing of the court action. Interpreting that time for arbitration proceeding stop when an action is file in the court is clearly against the provision of s 23 of the AA 2005, and court inherent jurisdiction and active interpretation have been curtailed by s 8 of the AA 2005. To find that s 23 and s 30 of the AA 2005 only applicable for cases when the matter is referred directly to arbitration, is a form of judicial activism.

[38] *Per contra,* LCP submitted that even though the Federal Court in *Tan Kok Cheng*'s case relied on the common law which was premised on the judicial philosophy holding that consent of parties cannot confer or oust the jurisdiction of a court, the jurisprudential philosophy on the jurisdiction of the Courts to deal with all civil matters as propounded in the said case law remains valid and authoritative before and even after the enactment of AA 2005. As for s 8 of the AA 2005, which introduced the principle of minimum intervention by the courts, LCP argued that none of the limitations on the jurisdiction of the courts as prescribed by the AA 2005 oust the judicial power of the courts to deal with and hear any civil matters arising within their jurisdictions before the stay under s 10(1) of the AA 2005 is activated. This is apparent when sub-ss 10(1) and (3) of the AA 2005 recognise the judicial power of the courts by acknowledging the possibility of parties bringing actions before a court in respect of a matter which is the subject of an arbitration agreement, and if stayed, the issue will be pending before the court. LCP further argued that the Legislature, instead of requiring the court to strike out the actions under O 18 r 19 of the Rules of Court 2012, has only mandated the court to stay the actions upon an application by a party under s 10 of the AA 2005.

[39] Upon careful consideration and deliberation on this point, we agree

with LCP's submission. In effect, none of the provision under the AA 2005 or LA 1953 would effectively limit or oust the jurisdiction of the courts. Even though s 8 of the AA 2005 provides that 'No court shall intervene in matters governed by this Act, except where so provided in this Act', we are of the view that the court's jurisdiction is limited only to matter that have already been referred to arbitration. Perspicuously, this does not mean to bar the contracting parties from filing civil action in courts even if the claims is based on an arbitration agreement. The courts, always maintained the unfettered jurisdiction to hear any civil action, and for the lower courts it will subject to the jurisdictional limit set under the Subordinate Courts Act 1948 ('the SCA 1948').

[40] In relation to the sessions court's civil jurisdiction, para 65(1)(b) of the SCA 1948 provides that a sessions court shall have jurisdiction to try all other actions and suits of a civil nature where the amount in dispute or the value of the subject matter does not exceed one million Ringgit. As the basic principle of law states that a court's jurisdiction cannot be ousted by consensus of parties, we are of the view that the jurisprudential philosophy on the jurisdiction of the courts to deal with all civil matters, including the matters that involve an arbitration agreement, as propounded by the Supreme Court in *Newacres Sdn Bhd's* case and the Federal Court in *Tan Kok Cheng*'s case remains as a good law even after the enactment of AA 2005. Thus, the KLSC Suit 350 is a valid action even though it is subjected to the to stay application under s 10 of the AA 2005 to refer the dispute to arbitration.

[41] Besides that, we are also of the view that the notice of arbitration issued by the plaintiff is a consequence of the stay order issued by the LSCJ on the defendant's application. It is a continuation process which flows from plaintiff's action in the KLSC Suit 350. Therefore, the process of issuing the notice of arbitration arising out of a stay order cannot be viewed in isolation. It is pertinent to note that the notice of arbitration date 30 June 2020 issued by the plaintiff against the defendant clearly refer to the stay order issued in the KLSC Suit 350. Paragraph 1.2 of the notice of arbitration is as follows:

> SH Builders & Marketing Sdn Bhd ('the Claimant') demands that all disputes, differences, claim and counter claims (if any) between the Claimant and Bongsor Bina Sdn Bhd ('the Respondent'), arising during and/or after the completion, for the project entitle 'Cadangan Membina 12 Unit Banglo 1 Tingkat yang mengandungi Type A-6 Unit dan Type B-6 Unit berserta 1 Unit TNB Substation di atas Lot 2512, Seksyen 36, Poskod 40470 Shah Alam, Selangor Dami Ehsan untuk LB Development Sdn Bhd' ('the Project') *be referred to arbitration ('Arbitration') pursuant to the Kuala Lumpur Sessions Court Order dated 21.10.2019 [Sivil Suit No: WA-B52(NCvC)-350-08/2019]* ('Court Order') and, pursuant to Clause 27 [Attachment B] of the Letter of Award dated 26.6.2012 entered between the Claimant and the Respondent pursuant to the Project ('Letter of Award'). (Emphasis added.)

[42] Moreover, s 2 of the LA 1953 defines an 'action' to include a suit or any other proceeding in a court of law. Plainly, the plaintiff cannot be said to have sat on his right, nor can he be blame for not taking action on a stale claim upon filling the notice of arbitration after the KLSC Suit 350 has been stayed. Coupled with the jurisprudential philosophy on the jurisdiction of the courts to deal with all civil matters, we are of the considered view that the LHCJ's is correct in his finding that the provision in s 30 of the LA 1953 and s 23 of the AA 2005 only applicable to cases where the dispute directly referred to arbitration.

[43] On a different scenario, if we consider the LCD's contention that limitation under s 30 of the LA 1953 applies when the plaintiff served the notice of arbitration on defendant on 1 July 2020, undoubtedly the plaintiff or even the court, would be put on an absurd situation. For the plaintiff, on one hand it cannot pursue its claim against the defendant before arbitration based on statutory limitation and on the other hand, there is still a valid court proceeding *via* KLSC Suit 350 that being stayed pending the arbitration proceedings. As for the court, the situation also abounds in anomaly. At one hand, the KLSC Suit 350 being a valid action is still pending in court even though the arbitration is a non-starter based on limitation and at the other hand, the LSCJ had no reason to strike out the said suit since the plaintiff filed it before the limitation set in.

[44] As such, we are of the view that a liberal or reasonable approach in interpreting the law on limitation to address such a situation based on the legal maxim *dubiis, benigniora praeferenda sunt* should prevail and the legal maxim *ut res magis valeat quam pereat* should applies to avoid any absurd results. The rationale behind these applications are in line with the jurisprudential philosophy on the jurisdiction of the courts to deal with all civil matters and more importantly, to uphold and to give effect to arbitration agreements.

[45] Based on those foregoing, we agree with LCP's argument that it would be unreasonable, unjust, unfair and indeed tactical for the defendant to subsequently raise the defence of limitation against the plaintiff in the arbitration proceedings when the plaintiff was complying with the stay order in satisfying the request of the defendant to resolve the matter in dispute in arbitration. We also find that the stay order would be rendered nugatory or redundant if we decide in favour of LCD's arguments, that is, the limitation had set in against the plaintiff upon service of the notice of arbitration on 1 July 2020.

[46] Applying the principles of law adumbrated above, we find ourselves in agreement with the finding of the LHCJ that the limitation stops based on sub-s 6(2) of the LA 1953 in respect of the dispute when the plaintiff

commence an action *via* the KLSC Suit 350 against the defendant on 6 August 2019. We also agree with the LHCJ finding that s 30 of the LA 1953 and s 23 of the AA 2005 only applicable to cases where the dispute is directly referred to arbitration *ab initio* in the absence of a prior court action that has been stayed.

[47] On the final note, we have to emphasise that the plaintiff must act promptly or within a reasonable time in filing the notice of arbitration once the KLSC granted stay application in favour of the defendant. Failing with, the plaintiff is at risk to be find liable for laches. From the fact of the case, the plaintiff took nine months to serve the notice of arbitration on the defendant, that is, from the date of the stay order on 31 October 2019 and the date of service on 1 July 2020. Even though the late filing of the notice of arbitration is not an issue in this appeal, for us the plaintiff inaction is a bit too long. Anyhow, we are aware that the plaintiff had a reason for the delay. It was due to the Movement Control Order under Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 (Act 829) as explained at para 8 of the plaintiff's affidavit in response dated 11 May 2022 that can be seen at pp 49–54 of the encl 4. Thus, the plaintiff had a valid reason for the delay.

CONCLUSION

[48] For all the above reasons, we are unable to see how the LHCJ was plainly wrong in his decision. We find no merits in the defendant's appeal. We affirm the LHCJ's decision and the appeal is hereby dismissed with cost of RM20,000 to the plaintiff subject to allocator.

Learned High Court judge's decision affirmed; appeal dismissed with costs of RM20,000 to respondent subject to allocator.

Reported by Dzulqarnain Ab Fatar